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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE DISTRICT OF ARIZONA  
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8 CANDACE NORED, JUSTIN NORED, )

9 Plaintiffs, )

10 v. )

11 CITY OF TEMPE, ANDREW )  
12 MAZOFF, )

13 Defendants. )  
14

No. CV 08-00008 PHX MEA

ORDER

15 All of the parties have consented to the exercise of  
16 magistrate judge jurisdiction over this matter, including the  
17 entry of final judgment. Before the Court is Defendant  
18 Mazoff's motion [Docket No. 13] to dismiss Plaintiff's state  
19 law claims against him.

20 **I. Procedural History**

21 Plaintiffs, who are represented by counsel, filed a  
22 complaint in the Maricopa County Superior Court on November  
23 30, 2007.

24 Plaintiffs' complaint alleges that, on February 9, 2007,  
25 Defendant Mazoff, a City of Tempe police officer, was sent to  
26 Ms. Nored's apartment. Defendant Mazoff was sent to the  
27 apartment to do a "welfare check." The complaint alleges  
28 Defendant Mazoff, acting within the scope and course of

1 employment, entered Ms. Nored's home without cause or her  
2 permission and that he physically assaulted her by, *inter*  
3 *alia*, forcing her to the ground. The complaint alleges Justin  
4 Nored, a minor child, witnessed the mistreatment of his  
5 mother.

6 As a result of the altercation with Defendant Mazoff,  
7 Plaintiff was arrested and charged with aggravated assault on  
8 Defendant Mazoff and with resisting arrest. Plaintiff was  
9 taken into custody and released after approximately 18 hours.  
10 The complaint further alleges Ms. Nored, who was pregnant at  
11 the time, did not receive appropriate medical care while in  
12 Defendants' custody. The complaint alleges Ms. Nored's  
13 pregnancy was terminated as a result of the injuries sustained  
14 by Ms. Nored at the time of her arrest and her treatment while  
15 in custody. The complaint states the criminal charges filed  
16 against Ms. Nored were later dismissed.

17 On or about August 6, 2007, Plaintiffs' counsel served  
18 the City Clerk for the City of Tempe with a "Notice of Claim"  
19 regarding the incident occurring on February 9, 2007.  
20 Defendants do not contest that Defendant Mazoff was no longer  
21 an employee of the City of Tempe on the date the notice of  
22 claim was served on the City of Tempe by Plaintiffs.

23 The complaint filed in state court on November 30, 2008,  
24 alleges both state law and federal law causes of action. On  
25 January 3, 2008, Defendant City of Tempe was served with the  
26 complaint and Defendant removed the matter to federal court.  
27 Defendant City of Tempe filed an answer to the complaint on  
28 January 4, 2008. Service of the complaint on Defendant Mazoff

1 was effectuated by publication on or about March 26, 2008.

2 See Docket No. 12, Exh. 8.

3       Seven of the eight causes of action stated in the  
4 complaint are based on state common law. The complaint states  
5 causes of action against Defendants based on trespass by false  
6 imprisonment and false arrest (Count I); assault and battery  
7 (Count II); abuse of process and malicious prosecution (Count  
8 III); negligent infliction of emotional distress (Count IV);  
9 intentional infliction of emotional distress, physical  
10 assault, denial of medical care (Count V); defamation (Count  
11 VI); violation of Plaintiffs' civil rights, pursuant to 42  
12 U.S.C. § 1983 (Count VII); and negligent hiring, training,  
13 retention, monitoring, supervision, discipline, entrustment  
14 and investigation (Count VIII).

15       The complaint alleges Defendant Mazoff is liable to  
16 Plaintiffs for his actions in both his individual and official  
17 capacities and alleges Defendant Mazoff acted within the  
18 course and scope of his duties as an agent of Defendant City  
19 of Tempe. Plaintiffs further allege respondeat superior as a  
20 basis for the Defendant City of Tempe's liability to  
21 Plaintiffs for the actions of Defendant Mazoff and other City  
22 of Tempe employees with regard to Plaintiffs' state law  
23 claims. The complaint seeks general, special, compensatory,  
24 punitive, and exemplary damages.

25       On April 15, 2008, Defendant Mazoff filed a motion to  
26 dismiss Counts I through VI and Count VIII as against him,  
27 pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.  
28 See Docket No. 13. Defendant Mazoff contends Plaintiffs'

1 state-law based claims against him are barred because  
2 Plaintiffs did not comply with Arizona's "notice of claim"  
3 statute, Arizona Revised Statutes § 12-821.01, by serving him  
4 personally with a notice of claim prior to filing suit. Id.  
5 at 3. Defendant Mazoff has not filed an answer to the  
6 complaint other than the motion to dismiss Plaintiffs' state-  
7 law based claims.<sup>1</sup>

8 Plaintiffs contend the statute does not require dismissal  
9 of Plaintiffs' state claims against Defendant Mazoff.  
10 Plaintiffs argue that notice of Plaintiffs' claims was  
11 effectively supplied to Defendant Mazoff by notification to  
12 his employer, Defendant City of Tempe. Plaintiffs  
13 alternatively argue that the statute does not apply to the  
14 claims against Defendant Mazoff because he was no longer  
15 employed by Defendant City of Tempe at the time the notice of  
16 claim was served. See Docket No. 20.

17 On May 9, 2008, Defendant Mazoff filed a reply in support  
18 of his motion to dismiss the state law claims against him. In  
19 his reply Defendant contends "[a]ctual notice and substantial  
20 compliance are insufficient to meet the requirements of the  
21 notice of claim statute." See Docket No. 23 at 7.

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26 <sup>1</sup> The Answer filed by Defendant City of Tempe asserts "said  
27 Notice of Claim fails to comply with Arizona Revised Statutes [] §  
28 12-821.01." Docket No. 5 at 2. Defendant City of Tempe's answer  
also alleges Plaintiffs did not comply with the time limitations  
set forth in the statute. See id. at 6.

## II. Discussion

The relevant Arizona statute provides, *inter alia*:

A. Persons who have claims against a public entity or a public employee shall file claims with the person or persons authorized to accept service for the public entity or public employee as set forth in the Arizona rules of civil procedure within one hundred eighty days after the cause of action accrues. The claim shall contain facts sufficient to permit the public entity or public employee to understand the basis upon which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. Any claim which is not filed within one hundred eighty days after the cause of action accrues is barred and no action may be maintained thereon.

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E. A claim against a public entity or public employee filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days.

Ariz. Rev. Stat. Ann. § 12-821.01 (2003 & Supp. 2007). State law further requires that any legal suit predicated on a tort claim against a public entity or public employee must be brought within one year of the date the claim accrues. See id. § 12-821.<sup>2</sup>

Defendant Mazoff asserts that Plaintiffs' failure to comply with a specific requirement of the statute, i.e., the failure to serve him individually as a "public employee," bars any state law claim against him. Plaintiffs allow they did not serve a notice of claim on Defendant Mazoff individually. Plaintiffs argue that they substantively complied with the requirements of the statute or, alternatively, that individual service on Defendant Mazoff was not required because he was

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<sup>2</sup> The statutes also preclude punitive or exemplary damages. Ariz. Rev. Stat. Ann. § 12-820.04 (2003 & Supp. 2007).

1 not a "public employee" at the time of service of the notice  
2 of claim.

3 Both Plaintiffs and Defendant have attached documents  
4 and information to their pleadings. Attached to Defendant's  
5 motion is a copy of the notice of claim served by Plaintiffs  
6 on Defendant City of Tempe. Plaintiffs attach to their  
7 response to the motion to dismiss, *inter alia*, correspondence  
8 with Defendant City of Tempe regarding Plaintiffs' attempts to  
9 locate Defendant Mazoff and an affidavit signed by an  
10 investigator and security consultant regarding the difficulty  
11 of serving police officers with legal notice. See Docket No.  
12 20.

13 Defendant Mazoff's motion is brought pursuant to Rule  
14 12(b)(6), Federal Rules of Civil Procedure, which requires  
15 dismissal for failure to state a claim for relief.<sup>3</sup> Rule

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17 <sup>3</sup> The outcome of the merits of the issue is the same under  
18 either analysis, but it is arguable whether the question presented  
19 by Defendant Mazoff is more properly analyzed pursuant to Rule  
20 12(b)(1). Rule 12(b)(1) provides for dismissal of a claim when the  
21 Court does not have subject matter jurisdiction over the claim.  
22 See, e.g., Thornhill Publ'g Co. v. General Tel. & Elecs., 594 F.2d  
23 730, 733 (9th Cir. 1979). The Arizona state courts' decisions on  
24 point have not been entirely consistent with regard to whether  
25 failure to comply with the statute deprives the court of  
26 jurisdiction over the claim. Compare Salerno v. Espinoza, 210  
27 Ariz. 586, 588, 115 P.3d 626, 628 (Ct. App. 2005) (stating  
28 compliance with the notice provision of § 12-821.01(A) is a  
"mandatory" and "essential" prerequisite to such an action and that  
a plaintiff's failure to comply "bars any claim."), and Mammo v.  
Arizona, 138 Ariz. 528, 531, 675 P.2d 1347, 1350 (Ct. App. 1983)  
(stating the requirement of serving notice on the putative  
defendant is a jurisdictional requirement and that the state  
Superior Court does not have jurisdiction over a claim until after  
notice is served), and Dassinger v. Oden 124 Ariz. 551, 552, 606  
P.2d 41, 42 (Ct. App. 1979) (finding compliance with the "specific  
amount" provision was jurisdictional, which holding was disagreed  
with in Pritchard and Young), with Young v. City of Scottsdale, 193

12(b)(6) bars consideration of matters outside the pleadings, with certain exceptions.<sup>4</sup> See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990). When deciding a Rule 12(b)(6) motion, the Court may not look beyond the complaint "to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss." Mason v. Arizona, 260 F. Supp. 2d 807,

Ariz. 110, 113, 970 P.2d 942, 945 (Ct. App. 1998) (finding the statute procedural and subject to substantial compliance, which latter holding was expressly rejected by Deer Valley Unified Sch. Dist. No. 97 v. Houser, 214 Ariz. 293, 152 P.3d 490, 495 (2007), and Ames v. Arizona, 143 Ariz. 548, 694 P.2d 836 (Ct. App. 1985) (holding that the plaintiff's failure to allege their compliance with the statutory notice requirements was not a jurisdictional defect). Cf. Pritchard v. Arizona, 163 Ariz. 427, 430, 788 P.2d 1178, 1181 (1990) (stating, with regard to section 12-821, that "filing a timely claim is not a jurisdictional prerequisite to bringing suit, but is a requirement more analogous to a statute of limitations," but interpreting an earlier version of the statute that allowed for "excusable neglect"). See also McGrath v. Scott, 250 F. Supp. 2d 1218, 1236 (D. Ariz. 2003) (refusing to consider exhibits submitted by the parties in a Rule 12(b)(6) motion involving the timeliness of a notice of claim under § 12-821.01 because the requirement was not jurisdictional in nature, but relying on Young, which has now been expressly rejected). The reasoning applied in Pritchard, which analogized the time limitations in section 821 to a statute of limitations, is not clearly transferrable to section 821.01, which contains substantive in addition to temporal requirements.

Consideration of the materials attached to the pleadings on the motion would be allowed under Rule 12(b)(1), however, the materials relate to Plaintiffs' claims of substantial compliance, actual notice, or the theory that service should be waived as impossible for Defendant Mazoff's efforts to evade service, which, as explained *infra*, fail as a matter of law.

<sup>4</sup> The Court may consider materials attached to Rule 12(b)(6) pleadings if they are materials of which the court may take judicial notice. The Court may also consider matters of public record, including court orders and pleadings in related or underlying cases which have a direct relation to the matters at issue. See Barron v. Reich, 13 F.3d 1370, 1377 & n.2 (9th Cir. 1994); Robinson Rancheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992).

1 814 (D. Ariz. 2003), quoting Schneider v. California Dep't of  
2 Corr., 151 F.3d 1194, 1197 (9th Cir. 1998). Rule 12(c)  
3 requires that, when matters outside the complaint are  
4 considered by the Court on a motion to dismiss, the motion  
5 should be treated as one for summary judgment. See San Pedro  
6 Hotel Co., Inc. v. City of Los Angeles, 159 F.3d 470, 477 (9th  
7 Cir. 1998).

8 As explained more fully, *infra*, the Court concludes the  
9 statute does not allow for substantial compliance with its  
10 substantive provisions and that Defendant Mazoff was a "public  
11 employee" upon whom separate service of a notice of claim was  
12 required. The parties do not disagree about the fact that  
13 Defendant Mazoff was not individually served with a separate  
14 notice of claim by Plaintiffs within the time stated in the  
15 state notice of claim statute. Accordingly, because it is not  
16 necessary to consider the materials attached to the pleadings  
17 on the motion to dismiss to resolve the motion, the motion is  
18 resolved pursuant to Rule 12(b)(6) and the Court will not  
19 convert the matter to one seeking summary judgment pursuant to  
20 Rule 56, Federal Rules of Civil Procedure.

21 When a federal court exercises pendent jurisdiction over  
22 state law claims the outcome of the litigation in the federal  
23 court should be substantially the same, so far as legal rules  
24 determine the outcome of a litigation, as it would be if tried  
25 in a state court. See, e.g., Redner v. Citrus County, 710 F.  
26 Supp. 318, 321 (M.D. Fla. 1989). Cf. Felder v. Casey, 487  
27 U.S. 131, 151, 108 S. Ct. 2302, 2313 (1988) (making this  
28 statement in the context of holding that a state notice of



1 claim statute did not apply to the plaintiff's 42 U.S.C. §  
2 1983 claims).

3 As stated supra, Arizona's notice of claim (or intent to  
4 sue) statute provides, in relevant part:

5 A. Persons who have claims against a public entity  
6 or a public employee shall file claims with the  
7 person or persons authorized to accept service for  
8 the public entity or public employee as set forth in  
9 the Arizona rules of civil procedure within one  
10 hundred eighty days after the cause of action  
11 accrues. The claim shall contain facts sufficient to  
12 permit the public entity or public employee to  
understand the basis upon which liability is  
claimed. The claim shall also contain a specific  
amount for which the claim can be settled and the  
facts supporting that amount. Any claim which is not  
filed within one hundred eighty days after the cause  
of action accrues is barred and no action may be  
maintained thereon...

13 Ariz. Rev. Stat. Ann. § 12-821.01 (2003 & Supp. 2007).

14 The trajectory of the Arizona legislature's position on  
15 this statute has been to strengthen and specify the  
16 requirements of the statute. The state legislature has  
17 amended the statute to affirm that the statute's requirements  
18 are to be strictly applied. See, e.g., Deer Valley Unified  
19 Sch. Dist. No. 97 v. Houser, 214 Ariz. 293, 298 n.6, 152 P.3d  
20 490, 495 n.6 (2007) ("Houser") (noting the notice of claim  
21 statute was amended in 1992 to counter state court opinions  
22 that had applied a "reasonableness" standard for compliance  
23 with the "specific amount" requirements of the statute).

24 In expressly rejecting the decision in Young v. City of  
25 Scottsdale, 193 Ariz. 110, 113, 970 P.2d 942, 945 (Ct. App.  
26 1998), the Arizona Supreme Court's Houser opinion held that  
27 the statute's "specific amount" requirement was not subject to  
28 a "reasonableness" analysis and that actual notice and

1 substantial compliance could not be applied to allow a  
2 plaintiff's claims to proceed. See 214 Ariz. at 299, 152 P.3d  
3 at 496 (holding that the plaintiff's claim letter satisfied  
4 the statute, however, also noting dismissal might be  
5 appropriate based on the plaintiff's failure to comply with  
6 the statute's time limitations). See also Martineau v.  
7 Maricopa County, 207 Ariz. 332, 337, 86 P.3d 912, 917 (Ct.  
8 App. 2004) (rejecting substantial compliance and actual notice  
9 arguments but concluding the statute did not apply because the  
10 suit was for declaratory rather than monetary relief).

11 The state court's opinion in Houser cites to its prior  
12 decision in another en banc decision of the Arizona Supreme  
13 Court. The issue in that case was whether the plaintiff was  
14 required to effect service of a notice of claim in compliance  
15 with the state rule regarding service of a legal complaint.  
16 See Falcon ex rel. Sandoval v. Maricopa County, 213 Ariz. 525,  
17 527, 144 P.3d 1254, 1256 (2006) (en banc). In Falcon, the  
18 Arizona Supreme Court stated:

19 If a notice of claim is not properly filed within  
20 the statutory time limit, a plaintiff's claim is  
21 barred by statute. Salerno v. Espinoza, 210 Ariz.  
22 586, 589, ¶ 11, 115 P.3d 626, 629 (App. 2005).  
Actual notice and substantial compliance do not  
excuse failure to comply with the statutory  
requirements of A.R.S. § 12-821.01(A).

23 Id. (reversing the Court of Appeals and affirming summary  
24 judgment in favor of a public entity defendant because the  
25 plaintiff had served only one member of the county Board of  
26 Supervisors because it could not be said that this constituted  
27 service on the executive officer of the public entity, i.e.,  
28 the Board of Supervisors, as a whole).

1       The Arizona Court of Appeals has repeatedly held that the  
2 doctrines of substantial compliance and actual notice of a  
3 claim may not be applied to allow a suit to proceed when a  
4 plaintiff has not strictly complied with the substantive terms  
5 of the statute. In Harris v. Cochise Health Systems, the  
6 intended individual defendant had herself received and  
7 reviewed the notice of claim as statutory agent for the public  
8 entity, however, the intended individual defendant was not  
9 named in the notice of claim. The Arizona Court of Appeals  
10 concluded the plaintiff's state claims against the individual  
11 defendant public employee must be dismissed for the  
12 plaintiff's failure to give separate notice to the individual  
13 defendant, even though she had "actual" notice of the claim.  
14 See 215 Ariz. 344, 351-52, 160 P.3d 223, 230-31 (2007)  
15 ("Failure to comply with the statute is not cured by actual  
16 notice or substantial compliance.").

17       In Johnson v. Superior Court, the specific question  
18 presented by special action to the Arizona Court of Appeals  
19 was whether the statute required separate service of a notice  
20 of claim on individual police officers in addition to the  
21 public entity. The case involved a plaintiff's allegation  
22 that police officers used excessive force in the context of an  
23 arrest. The Court of Appeals held that separate service on  
24 the individual officers was required.<sup>5</sup> 158 Ariz. 507, 508,

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26       <sup>5</sup> The Johnson court further declared the failure of the  
27 plaintiff to serve separate notices on the officers did not require  
28 dismissal of the claims because, under the previous version of the  
statute, the officers might be entitled to indemnification from the  
plaintiff's counsel if found liable at trial.

1 763 P.2d 1382, 1383 (1988). Additionally, although not the  
2 precise issue before that court, in Crum v. Superior Court the  
3 Arizona Court of Appeals stated that compliance with the  
4 statute requires notice to "both" the individual public  
5 employee and the public entity when the plaintiff alleges the  
6 tortious acts of the individual were within the scope of their  
7 employment. See 186 Ariz. 351, 352, 922 P.2d 316, 317 (1996)  
8 (concluding a letter sent to the public employee was  
9 substantively inadequate to fulfill the statute but that  
10 compliance was not required because the plaintiff did not  
11 allege the public employee was acting within the scope and  
12 course of their employment).

13 The undersigned further notes the state Court of Appeals  
14 very recently concluded judgment as a matter of law was  
15 appropriate when the plaintiff had not strictly complied with  
16 the substantive terms of the statute. The Arizona Court of  
17 Appeals held that the "'substantial compliance' rationale"  
18 proffered by the plaintiff had been "superseded by the strict  
19 requirements of A.R.S. § 12-821.01." City of Phoenix v.  
20 Fields, \_\_\_ P.3d \_\_\_, 2008 WL 1796039, at \*7 & n.8 (Apr. 22,  
21 2008) (stating this in a case deciding, as a matter of first  
22 impression, that class action suits must comply with the  
23 statute and the plaintiffs' notice of claim failed because it  
24 did not state a sum certain for which the plaintiffs would  
25 settle their claims).<sup>6</sup>

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27 <sup>6</sup> Other unpublished opinions of the District Court considering  
28 the issue have concluded that strict compliance with the statute  
and separate individual service are required. See Louis Baker v.

1       The outcome of the motion to dismiss is controlled by the  
2 holdings of Johnson and Harris. Accordingly, the material  
3 submitted by Plaintiffs regarding the difficulty of serving  
4 notice on Defendant Mazoff is irrelevant because the statute  
5 does not allow for the requirement of separate service of a  
6 notice of claim on an individual defendant to be excused or  
7 waived because service of a notice of claim on the individual  
8 was difficult or impractical.<sup>7</sup> Additionally, there is no  
9 published legal opinion binding on this Court supporting  
10 Plaintiffs' contention that service on Defendant Mazoff was  
11 not required because he was no longer a "public employee" at  
12 the time of service of the notice of claim on the City of  
13 Tempe. The term "public employee" is defined by the statute

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14 City of Tempe, 2008 WL 2277882, at \*2 (D. Ariz.) (holding the  
15 plaintiff's failure to serve individual notices of claim on the  
16 individual defendants barred the state law claims against those  
17 defendants); DeBinder v. Albertson's, Inc., 2008 WL 828789, at \*3  
18 (D. Ariz.); Ramsey v. Arizona, 2007 WL 779663, at \*2-\*3 (D. Ariz.)  
19 (concluding that the statute did not allow for excusable neglect  
with regard to a pro se plaintiff's failure to serve notice of a  
claim on an individual defendant and affirming dismissal of the  
state law-based claim for malicious prosecution).

20       <sup>7</sup> The statute allows for the "filing" of a notice of claim by  
21 service of the notice of claim upon a person authorized to accept  
22 service of a legal summons for the individual tortfeasor in  
23 compliance with the Arizona Rules of Civil Procedure. Accordingly,  
24 Plaintiffs could arguably have effectuated service of a notice of  
25 claim on Defendant Mazoff by service of the notice of claim by  
26 means of publication. See Ariz. R. Civ. P. 4.1(n) (2007). But see  
27 Lee v. Arizona, 218 Ariz. 235, 182 P.3d 1169, 1172 (2008) (stating  
28 that to successfully "file" a notice of claim requires actual  
receipt by the public entity because of the statute's language  
regarding service on a "person" authorized to accept service for  
the entity or individual, but declining to interpret "'file' to  
forbid a claimant from proving a contested filing by pointing to  
the fact of mailing"). However, Plaintiffs do not assert that they  
timely attempted service of a notice of claim on Defendant Mazoff  
by any means.

1 and interpreted by the state courts as someone who was an  
2 employee at the time of the events giving rise to the  
3 purported liability because, otherwise, the individual's  
4 actions would not implicate the public entity's liability.  
5 See Ariz. Rev. Stat. Ann. § 12-802(5) (2003 & Supp. 2007)  
6 ("Public employee" means an employee of a public entity.");  
7 McCloud v. Ariz. Dep't of Pub. Safety, 170 P.3d 691, 699 (Ct.  
8 App. 2007) (holding the statute is intended to address the  
9 torts and breaches of those acting within the course and scope  
10 of their employment). The definition of the term advocated by  
11 Plaintiffs would thwart legislative intent in contravention of  
12 the plain language of the statute.

### 13 **III. Conclusion**

14 Plaintiffs do not dispute that they did not serve a  
15 separate notice of claim on Defendant Mazoff. The Court  
16 concludes that compliance with the substantive terms of  
17 Arizona's notice of claim statute is not susceptible to the  
18 theories of actual notice, substantial compliance, or waiver  
19 for impossibility. Additionally, the Court is not persuaded  
20 that the definition of "public employee" proffered by  
21 Plaintiffs should be adopted to allow that service of a  
22 separate notice of claim on Defendant Mazoff was not required  
23 because he was not a public employee at the time the notice of  
24 claim was served on Defendant City of Tempe. Accordingly, the  
25 state-law based claims against Defendant Mazoff must be  
26 dismissed with prejudice.

